1959

Ernest C. Tuttle v. Hi-Land Dairyman's Association et al : Brief of Appellants

Utah Supreme Court

Warwick C. Lamoreaux; Robert Rees Dansie; Attorneys for Appellants;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ERNEST C. TUTTLE,
Respondent,

—vs.—

HI-LAND DAIRYMAN'S ASSOCIATION, ROY HARRIS, and ELMER HOUSTON, Clerk of the Murray City Court,
Appellants.

Case No. 9126

BRIEF OF APPELLANTS

WARWICK C. LAMOREAUX
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STATEMENT OF THE CASE

This appeal, simply stated, is to determine two questions of law:

1. May a garnishment, after judgment, issue from a small claims court?

2. May a corporation, through its credit manager, enter the small claims court, file an affidavit, testify, and proceed without an attorney?

This action is in essence a declaratory proceeding to guide litigants and courts in small claims actions as to their rights and duties. There is confusion. (R. 55) Some small claims courts in Utah issue garnishments; some do not. Some small claims courts allow corporations to proceed without counsel; others require lawyers to conduct the action. To dispel this confusion, this appeal is prosecuted in order to achieve an authoritative determination.

This is not an appeal from a decision in a small claims court. It is an appeal from a collateral attack, brought by the plaintiff-respondent below, in the District Court of Salt Lake County, to enjoin the actions of the Murray City Court acting as a small claims court. In that action the interpretation of the statutes and rules are questioned and constitutional issues are raised.

STATEMENT OF THE FACTS

Appellant, Hi-Land Dairyman's Association, hereinafter called "Hi-Land", delivered milk to respondent, Tuttle, who failed to pay for same. Hi-Land thereupon brought an action in the Small Claims division of the Murray City Court. (R. 26) The credit manager of Hi-Land was Roy Harris, (R. 63, 67) who prepared the Affidavit (ex. 1-P) stating Tuttle owed Hi-Land $40.48 for the merchandise.

Upon process being served, and at the appointed date for trial, respondent Tuttle appeared and appellant Harris testified for Hi-Land. No attorney was present. (R. 26) Both Tuttle and Harris were sworn, and testified. No one argued.

> ". . . the Judge asked Mr. Tuttle if he owed the bill and Mr. Tuttle says 'I do,' and the Judge says, 'When are you going to pay it?' and Mr. Tuttle said, . . . he would like a little time to pay the claim so the Judge asked him what he wanted and Tuttle said that he would like two payments to pay the claim." (R. 32-33)

The Small Claims judge entered a judgment as prayed, allowing Tuttle to pay one-half on May 5, 1958 and the rest on June 5, 1958, said judgment being entered April 24, 1958. Exhibit 2-P is the docket showing procedures. (R. 34)

> "Mr. Tuttle placed himself on the mercy of the Court and agreed to pay one-half on the 5th day of June." (R. 51)

"He admitted that he owed the money and that he would pay it." (R. 63)

When Tuttle didn't pay, on May 8, 1959, Houston, Clerk of the Court, issued a garnishment, and the docket shows it was returned on May 9. (Ex. 2P; R34) The Garnishe's Answer, showed money due to Tuttle from Kemp & Kelsey "for salary for payroll period . . ."

Appellant Houston as clerk of the court issued and served the garnishment and appellant Harris served the garnishee execution (R. 29) by which Kemp & Kelsey paid over to appellant Hi-Land $50.18. The Garnishee Execution form as it was prepared and served is among the court's exhibits. It was on the basis of the garnishee execution, based on the judgment, that the collection was made. (R. 34) Thus the collection on the judgment was completed by May 23, 1995 as shown on exhibit 2-P, being the docket of the court.

On May 27, 1959 respondent Tuttle filed a complaint in the District Court of Salt Lake County against appellants Hi-Land, Harris, and Houston, thereby undertaking collaterally to enjoin the Murray Small Claims court from issuing garnishments, enjoining Harris from taking action in that court except through an attorney, and for a return of the $50.18 recovered by Hi-Land, among other things. (R. 1)

After answers, the pretrial order reflected important stipulations and the narrowing of the issues, (R. 16) and trial was had resulting in Findings of Fact and Conclusions of Law (R. 87) and a Judgment. (R. 91) Three

essential elements are reflected in the Findings, Conclusions and Judgment of the court, as follows:

(1) Tuttle was given judgment for the return of the $50.18 that had been recovered in the Small Claims court earlier.

(2) The clerk of the Small Claims court was permanently enjoined from issuing a garnishment out of that court.

(3 Appellants Hi-Land and Harris were permanently enjoined from proceeding in the Small Claims court: Hi-Land could not proceed without an attorney, and Harris was held to be practicing law. (R. 91-92)

This appeal is prosecuted by all of the appellants, not essentially because of any loss of the $50.18, as such, but in order to have determined the following:

(a) May a corporation use the Small Claims court without the use of an attorney?

(b) May a garnishment issue out of the Small Claims court?

Appellants believe the trial court erred in its decision, and will undertake to show the errors committed.

By the District Court finding that a corporation must use counsel, and that the Small Claims court cannot issue a garnishment, collection procedures to the people of the state of Utah are placed in great doubt. Appellant Hi-Land has been deprived of its property, to wit: the fruits of its collection against Tuttle. The statutes have been misconstrued. Due process of law has not been given Hi-Land. Hence this appeal.

STATEMENT OF POINTS

POINT I

THE COURT ERRED IN FINDING THAT A CORPORATION MAY NOT PROCEED IN A SMALL CLAIMS COURT EXCEPT THROUGH AN ATTORNEY, AND THAT A CORPORATE CREDIT MANAGER PRACTICES LAW WHEN HE PURSUES A CASE THROUGH SMALL CLAIMS.

POINT II

THE COURT ERRED IN ENJOINING A SMALL CLAIMS COURT FROM ISSUING A GARNISHMENT.

POINT III

THE COURT ERRED IN GRANTING JUDGMENT TO ESPONDENT FOR $50.18 AND COSTS.

ARGUMENT

POINT I

THE COURT ERRED IN FINDING THAT A CORPORATION MAY NOT PROCEED IN A SMALL CLAIMS COURT EXCEPT THROUGH AN ATTORNEY, AND THAT A CORPORATE CREDIT MANAGER PRACTICES LAW WHEN HE PURSUES A CASE THROUGH SMALL CLAIMS.

The Findings of the court say:

> "That a corporation of the State of Utah may not appear in the courts of this state including the Small Claims Division of the Murray City Court except through an attorney authorized and licensed to practice . . ." (R. 90)

In this case it is clear that the Hi-Land corporation undertook to and did appear before the said Small Claims court and got judgment under its credit man-

ager, Harris. Let it be clear that only procedures before the Small Claims courts are involved in this appeal.

A real problem exists within the Small Claims courts of Utah: It appears that such courts in Richfield, Tooele, Moab, Ogden, and Murray, Utah, allow corporations to proceed in the manner followed by the Murray Small Claims court as here stated. In the Small Claims courts of Salt Lake City and Provo, Utah, corporations are not allowed to proced without counsel, and they do not issue garnishments. (R. 75) Hence the issues are of much deeper significance than the immediate litigants.

The Murray Small Calims court has from thirty to forty cases per month. (R. 38)

Appellant Hi-Land files in its larger territory many such cases each month, as high as thirty or forty. (R. 31, 67, 81) Many problems beset the corporation in making small collections, to be later adverted to, where it is uneconomic to proceed except through the credit manager of the corporation. The statutes of Utah creating the Small Claims court gives the answer as to how to proceed.

SMALL CLAIMS STATUTES

The enactment came to Utah in 1933 (Laws of Utah 1933, p. 28) as, in the early professorial language of Felix Frankfurter: "one of the most notable achievements of recent years in procedural reform — the small claims courts . . ." (37 Harv. L. Rev. 786) He stated there that the new, informal procedures were matters

"vital to the great masses, and vital to continued confidence in law. The germ of the innovation is set forth in section 78-6-8 UCA 1953 to the effect that "No formal pleading, other than the said affidavit and notice shall be necessary and the hearing and disposition of all such actions may be *informal, with the sole object of dispensing speedy justice between the parties.*" The $50.00 limit was extended by the 1953 amendment to $100.00.

In the case at bar, we are struck with the fundamental proposition that a corporation cannot enter the Small Claims court except through a licensed attorney. Against this proposition, the matter of the issuance of garnishments is secondary, to be treated under a subsequent head.

The principal issue here is whether or not a corporation is to be forced to enter this lowest of all courts solely through a lawyer. The issue involves sober consideration to the bench and bar; there are implications that involve the public relations of the entire legal profession. The decision of this court requires a careful analysis of the public interest along with that of the bar. Much harm may be done without a careful weighing of subtle values.

We do not find this court to have dealt with the Small Claims issue. This is a case of first impression.

The Small Claims court is a "department" of the "Justice Court" according to the organic act creating it. 78-6-1 UCA 1953. The procedure for the action is stated in the following section 78-6-2:

> "Actions may be maintained in the small claims court whenever *any person* appears before any justice of the peace or judge or clerk of a city court and executes an affidavit setting forth the nature and basis of the claim . . ."

Thus we are confronted first with the question: may a corporation enter the small claims court, through a person, to wit, its credit manager, and execute the required affidavti? At bar, appellant Harris executed the affidavit (exhibit 1-P R. 52) There was confusion in the Murray Small Claims court in the manner of stating the name of the plaintiff as being appellant Hi-Land, (R. 52, 53) but the pretrial session ironed out these difficulties by finding that in truth and fact, the plaintiff was Hi-Land, to whom respondent Tuttle owed the money for milk delivered. (R. 17, 53)

This court must examine the meaning of the words "any person" as used in 78-6-2. To say that it does not embrace a corporation would not make good law. Constantly throughout our law the word person and corporation are used interchangeably. "Person" is not a word of art as here used, we must contend. In 48 C. J. 1038 it is said: the word person "is synonymous with party, or party to the action, or suit." Certainly we recognize a corporation as a party to an action.

The word "person" never appears again in the organic small claims statute. Beginning with 78-6-3 it is changed to the word "claimant," which word is broader, and includes any person or entity having a claim to be proven, and would obviously embrace a

corporation. No one would argue that a corporation could not be sued as defendant in the small claims act. There is nothing in the act being construed that precludes a corporation being a plaintiff. It would torture the practice of our courts to say that a corporation may not be plaintiff in a small claims action. No good would be served, and it would complicate. To say that a corporation cannot sue in a small claims court would suggest that it could assign its claim to an individual, who then would qualify as "any person" but this begs the question. By 78-6-6 UCA 1953: "No claim shall be filed or prosecuted in small claim court by an assignee of such claim." Thus we come to grips with the fundamental question earlier stated. There is no good reason that precludes a corporation from entering the small claims court.

The basic theory of the small claims procedure is clearly stated in 78-6-8:

> "No formal pleading, other than the said affidavit and notice shall be necessary and the hearing and disposition of all such actions may be *informal,* with the sole object of dispensing *speedy justice* between the parties."

To erect the block of prohibiting corporations from the small claims procedures is at once to inject formality, proscribed by the statute. The object is informality, speedy justice. GINTHER v. SOUTHWEST WORKOVER CO. 286 SW 2d 291 at 295 will aid in finding that "ordinarily the term person includes a corporation," unless the legislative history, executive interpre-

tation or other aids to construction, clearly show some other intent.

The Constitution of the State of Utah, Art. XII, sec. 4, secures rights and duties to corporations like unto natural persons:

> "The term 'corporation' as used in this article, shall be construed to include all associations and joint-stock companies having any powers or privileges of corporations not possessed by individuals or partnerships, and all corporations shall have the right to sue, and shall be subject to be sued, in *all* courts, in like cases as *natural persons.*"

The word "person" seems to have no generic definition in our statutes. It is defined in thirteen separate sections shown at page 207 of the general index in vol. 10 UCA 1953. Under the Declaratory Judgments act, at 78-33-13 the definition is quite typical:

> "The word 'person' whenever used in this chapter, shall be construed to mean any person, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever."

To the same effect is the definition under Commerce and Trade, 13-2-20.

In PRUDENTIAL INS. CO. v. SMALL CLAIMS COURT, 76 Cal App 2d adv. 465, 173 P.2d, 38 167 ALR 820 the District Court of Appeals of California laid down the leading case in that jurisdiction, well annotated, and worthy of being followed here. It asks the question:

"Is a corporation a 'person' within the meaning of this section?"

One of the primary issues in the case at bar also includes that of whether an attorney may enter the small claims court. This excellent California decision shows that in that state the legislature prohibits attorneys from having anything to do with a small claims case, and the issue there was whether this deprived a litigant of due process. The Prudential case held:

> "It must be apparent that when #117 g provides that only the plaintiff and defendant may prosecute or defend such actions, and prohibits any 'other person' from so appearing, it did not intend to exclude, and by its language it does not exclude, a proper representative of the corporation from appearing or defending such actions. The contended for interpretation would disregard the provisions of the Constitution and the Civil Code above quoted. Since corporations can only appear through some natural person it is obvious that the proper natural person may appear to prosecute or defend such claims, and that such a proper person is not an 'other person' excluded by #117 g."
>
> ". . . Now who is a proper representative that may lawfully appear in such cases? Obviously the members of the board of directors and other officers should be permitted to so appear . . . In the present case the foreign corporation did not have an officer or member of its board in California. It did have, however, a manager of its life business, who was also its statutory agent for service of all legal process in this state. He, quite clearly, can appear on behalf of the corporation to defend the action.

> Just who else should be permitted to appear on behalf of the corporation is not entirely clear and could well be a subject for legislative action. In the absence of such action it would appear just and proper, that *any regular employee* not directly employed as a lawyer, but whose duties give him peculiar knowledge of the facts of such cases, could appear to represent the corporation, and this is so whether or not he is an attorney."

The California Court came head on with the policy as to why attorneys were kept out of the small claims court, in saying:

> ". . . As already pointed out, one of the main purposes of the legislature as expressed in the statute is to restrict the proceeding to the actual litigants and their witnesses and to prohibit either side from using a representative advocate such as an attorney. To allow one of the litigants in such action to gain the advantage of legal representation in the manner here attempted would contravene the clear purpose and intent of such statute. That cannot be permitted."

So thus we have the court of California declaring that corporations not only may enter the small claims courts, by their regular employees, informed on the subject matter before the court, but in addition, that the corporation cannot be represented by a licensed attorney The California statute is a great deal like the organic act in Utah, and ours might even have been taken from that state.

The issue is far deeper than preserving to the legal profession possible business for lawyers. If the small

claims court system is to remain workable, then the small litigant must be protected in his "personal" right to claim and defend, informally. To force the corporation to use counsel would put the defendant to his caution to likewise get counsel, in which case, the real purpose of the small claims procedure is defeated for the benefit of the legal profession.

Certainly the Bar of California is presumed to have been alert to the statutory enactment that cut lawyers off from small claims business, but that prohibition passed that legislature, and was upheld by a unanimous Court! It is for this splendid holding that we are willing to say that the prime interest to be protected is the public, and its confidence in the courts, and not the limited interest of attorneys to a field in which their function is demonstrated as of doubtful value.

This excellent decision upheld the right of the corporation to use the small claims court, and deprived the lawyer of entry therein. If that case is authority, it disposes on rational grounds of the main part of this appeal. The Utah statute does not in terms prohibit attorneys. We do not argue here that attorneys should be kept out of that court. We simply say that if a corporation does not wish to use counsel, it certainly should not be required to use a lawyer. To engraft into the statute a requirement that corporations use an attorney is at once to place the opposite party at a disadvantage, and force resort to like counsel, in which case, the entire theory of the small claims court is defeated. The procedures ought to remain informal. The excellent dis-

cussion in the Prudential case is appellant's best argument, without reproducing its many elements here.

The annotation following the Prudential case at 167 ALR 827 states the core purpose of small claims courts as follows:

> "The purpose of these courts is to provide a speedy hearing at *low cost* to the litigants and by virtue of the procedural innovations which have, to a great degree, minimized the technicalities usually *confronting and confounding* the parties involved in a legal dispute, the purpose seems to have been accomplished. The unprecedented informality of the hearings has made it possible for a court of this nature to adjudicate a maximum of claims in a minimum of time and, as there has been no abandonment of the rules of substantive law, with an apparent legal sufficiency."
>
> "In an effort to reach the ultimate in nontechnical proceedings some jurisdictions have by legislative fiat or rule of court excluded attorneys *from these hearings.* The necessity or advisability of this step, limiting participating in the adjudication of small claims to the immediate parties, is an open question and this annotation does not purport to give answers thereto."

The annotation note at page 829 states that in the following states no attorney is allowed to appear:

California
Colorado
Idaho
Kansas
Minnesota
North Dakota

In Michigan attorneys may not appear, but a personal representative may appear for the corporation.

By the consent of the court, attorneys *may* appear in Oregon, Washington, Iowa. In the Municipal Court of the District of Columbia, the pleadings inform defendant that he may come with or without counsel. Note what the annotation says about Utah: (page 829)

> "And the provisions of the Utah Code (title 20, c 52 ¶7) although not specifically barring attorney are said to be similar in purport to ¶117 g of the California Code of Civil Procedure."

In the case at bar, let it be well remembered that Harris, the person signing and filing the affidavit, and appearing as a witness, and doing all that was done on behalf of the corporate Hi-Land, was its credit manager. (R. 63) There can be no doubt but that he was "a bona fide employee," the person best informed, whose "duties give him peculiar knowledge of the facts of such cases," to quote the criteria of the Prudential decision.

Appellant Harris "followed his instructions" meaning the clerk of the Murray Small Claims Court, R. 52) who referred to said credit manager to the proper form, (R. 56) instructing how to fill it out. The garnishee execution was prepared by the clerk. (R. 57) Harris testified under cross-examination:

> "I am not a lawyer, Mr. Bell. I don't know the technicalities of the law." (R. 66)

Harris followed the procedures of Cy Gallagher who was credit manager ahead of himself, and who was

on a semi-retired status as assistant credit manager. (R. 68, 80)

As to the appellant Hi-Land's use and experience with attorneys in small claims actions, the witness Harris modestly stated:

> "Q. Have you used attorneys in the collection of Hi-Land Dairy bills generally?
>
> A. No
>
> Q. Why?
>
> A. With all respect to the legal profession, we have not found their service too satisfactory . . . It is not economically sound in all cases. We have to locate the individual and act on them immediately, otherwise we lose them . . . we found that there is a delay if we use legal counsel . . . from the fact that legal counsel does not know each individual account as much as we do and this would result in a delay in this explanation and any papers that had to be made out. (R. 69) . . . Well, the lawyer would have to make out papers, file them and this results in a delay in acting upon these affairs . . . important . . . it is because these accounts in most cases are with people who move around from job to job, from residence to residence, and when we find them we have to act now." (R. 69, 70)

The record shows that Warwick C. Lamoreaux, the writer of this brief, has been for a long number of years general counsel for appellant Hi-Land, and that the witness had discussed procedures with the writer, and Hi-Land was simply following the advice of its counsel.

(R. 71, 79) The witness expressly stated he had never "held himself out as a lawyer or practicing law." (R. 73)

The Utah statute aims at "dispensing speedy justice" (78-6-8), and in that connection, counsel for respondent summed up the question:

> "Q. Mr. Harris, the primary things that you have been able to accomplish in prosecuting these matters is that it enabled the company to move *swiftly* and act now, I believe that is the primary benefit?
>
> A. Yes." (R. 79)

Cy Galagher, the assistant credit manager at the time of the litigation at bar, and with longer experience with Hi-Land's problems, testified:

> "We tried the Salt Lake Small Claims Court with you (Lamoreaux) as attorney. It took half a day to get a judgment and it doesn't pay . . . We have a lot of — not one or two but hundreds of small claims . . . We file those in the Small Claims Court that we can't get any other way and they amount to ten, fifteen a month sometimes . . . less . . . more."
>
> "Q. Now, is it important to the Dairy that it have access to the Small Claims Court?
>
> A. Otherwise we just couldn't get our money . . . Because these are the type of people that will not pay unless you have the power of the court behind you to make them pay.
>
> Q. Now is it easy for you to get counsel to help in these small claim collections?
>
> A. It's been difficult because they are very small. It is on a contingent basis and some-

> times if you have located them once, they move again and you do not get them again. It is a waste of time." (R. 81, 82)

While appellant Harris was testifying, the court sustained an objection on the question of Hi-Land's experience in sending a batch of small collections to attorneys. Counsel for appellant made the following proffer of proof:

> "The witness, if he were allowed to testify on this, would testify that it has been the experience of Hi-Land Dairy in sending batches of collection matters to attorneys that the attorneys will try and make collections. They will succeed and make reports with respect to the larger claims, but as to the smaller claims, after the passage of several months, the claim goes back to the Dairy and then time has passed and it involves great difficulty for the Association to relocate and collect these small bills." (R. 74)

Before we return to the authorities to apply them to the above undisputed fact situation before this and the lower court, may we remind that appellant Hi-Land could not possibly be alone in this problem of effecting collection of numerous small amounts from ambulant debtors who learn the art of keeping on the move. True the witnesses were when they said that people move, and that attorneys are not quick to follow leads. How can a competent attorney give real attention to a collection of $10.00 or $30.00. The writer has gone through this problem for twenty years with appellant. When the proffer of proof was made by him he knows, with every other attorney, that the better cases, higher in

amount, are preferred, and that the small ones are returned "after the birds have flown," when it is too late for the credit manager to do a quick, effective job of obtaining "justice." There is no speedy justice available to plaintiffs in the record at bar. The corporation that sells milk, the gas company, the grocer, anyone having small amounts in great numbers to collect — are at the mercy of busy lawyers, and the proof is before this court that the best means available is their own credit department, not working on a contingency, but with the sole interest of the claimant, and without the necessity to bow to legal nicety. The small claims court is the answer to that prayer. It does not take anything real away from the busy, competent attorney. It is too important to leave to the young lawyer fresh out of law school, who has to learn by trial and error, and during the learning, the corporate creditor gets lost. The Utah statute does not need a narrow construction that will deprive corporations of the remedy this modern procedural innovation offers. But let us turn again to the authorities.

Massachusetts has ever been a leader in judicial procedures, and its Supreme Court made important law in the leading case of Mc LAUGHLIN v. MUNICIPAL COURT, 32 NE 2d, 266, 1951. There the plaintiff brought an action in the small claims court having statutes not different in any important particular from Utah. He appeared without counsel. Defendant appeared with counsel. When the attorney became prolix the court took the case into its own hands, examined

the witness, took active charge of the case and found for plaintiff. Defendant appealed, and the high court exhaustively treated the question of whether attorneys had the right to conduct litigation in small claims courts there. It held that the matter lay within the sound discretion of the court, and that the special procedures in small claims were aimed to be "simple, informal, and inexpensive." "The statute 'was intended to afford the court full power to prevent its being used contrary to the purposes of its enactment."

> "This principle does not prevent the presiding judge in a case under the small claim procedure from taking active charge of the proceedings and examining witnesses. Even under formal procedure the judge 'ought to be always the guiding spirit and the controlling mind at a trial.'" . . .
>
> "The statute relating to small claims procedure, however, contemplates if necessary more active participation of the judge in the conduct of the hearing than is usual under formal procedure. Obviously it was intended by the statute to provide a form of hearing in which assistance of parties by counsel would not be required, since it was contemplated that in many, if not most, cases the parties would not be so assisted. Indeed, in the present case, the plaintiff was not assisted by counsel . . . The defendant could not, by being represented by counsel, change the essential nature of the hearing to which he had assented . . .
>
> "Neither the statute nor the rule expressly forbids examination of witnesses by counsel . . .

> "But we are of opinion that a judge under the small claims procedure has a wide discretion with respect to the extent of participation by counsel in a hearing."

May it be kept in mind that defendant-respondent Tuttle appeared in the small claims court below, was sworn, admitted he owed the bill, put himself on the mercy of the court, asked for the privilege of paying for the milk in two installments. (R. 32, 51). He did not object to the procedure. It was only when an attorney outside the case failed to intimidate the appellants, (R. 29, 30, 59) that collateral attack was instituted in an attempt to rob Hi-Land of the recovery for the milk already consumed by the debtor who had not made timely objection to the procedure! And note that the appeal is not even designed to get the money back for the poor defendant! The drawing of the findings are intended to pay the attorney only for trying to make slow, tedious, and unsuccessful, the creditor's use of the small claims court. (R. 90) Mr. Tuttle took bankruptcy! (R. 59) Shall this court make the procedure informal, inexpensive, speedy? Or shall it require the old procedures of formality, and that appellants found did not serve them well? The McLaughlin case is excellent. The court ought to follow it, remembering that Utah procedure allows the defendant to appeal, with attorney fees to the prevailing party. 78-6-10 UCA 1953 This is one of the rare places where attorney fees are granted in the absence of agreement. This court might find relevance in the awarding of appellate attorney fees as the price of keeping attorneys out of the original proceeding.

At any rate, the enumeration of states that absolutely preclude attorneys from entering the small claims proceedings ought to caution this court from establishing a rule that under the silent Utah statute attorneys must appear for corporations. It will work much mischief if this court so affirms. If it reverses, procedural due process will have been preserved. If it affirms, appellant will have been substantially deprived of due process; it will be required to use a slower, less effective, and more expensive procedure that will not permit it to make its collections. Its debtors will escape payment by moving ahead of slower procedures we ought not cast attention upon.

The Massachusetts case places great emphasis on the discretion possessed by the trial judge. The record at bar is devoid of any abuse of discretion by Judge Lawrence E. Nelson who heard the case. The statutory procedure was well followed. There could be not the slightest criticism of the case down to the entry of judgment. Only the technical questions of whether an attorney should have been present (and one certainly was not needed in this case) and garnishment procedures are really under attack.

In the important case of SANDERSON v. NIEMANN, 110 P2d 1025 the Supreme Court of California again stated of the small claims court:

> "The chief characteristics of its proceedings are that there are no attorneys, no pleadings and no legal rules of evidence; there are no juries, and no formal findings are made on the

> issues presented. At the hearings the presentation of evidence may be sharply curtailed, and the proceedings are often terminated in a short space of time. The awards, although made in accordance with substantive law, are often based on the application of common sense; and the spirit of compromise and conciliation attends the proceedings. (cases)

The Sanderson case supra cites from 1 WIGMORE EVIDENCE, 3rd edition, 1940, section 4d, page 106 as follows:

> "In small causes generally . . . it would be a defiance of common sense and a nullification of the main purpose, to enforce the jury trial rules of evidence; for the parties are *expected to appear personally without professional counsel,* and they cannot be expected to observe rules which they do not know."

We are familiar with the doctrine that under ordinary circumstances a corporation cannot appear in court except through an attorney. The principles are laid down in PARADISE v. NOWLIN, 195 P2d 867 by the California court for reference. In that case the court found the rule stated; however it made express reference to the exception to corporations entering small claims courts, where statutory authority so allows, as in PRUDENTIAL INSURANCE, v. SMALL CLAIMS COURT, supra.

We must admit that the Utah statute in terms does not reach as far, nor is it as explicit, as the California statute which prohibits attorneys in small claims courts. The current edition of the California statute, with anno-

tation, is at WEST'S ANNO. CALIF. CODES, Civil Procedure, vol. 13, at page 166, under section 117g.

We believe there is more than ample authority in the Utah statute for this court to construe the small claims act as permitting a corporation to proceed propria persona, not through an attorney. As before stated, "any person" may appear and execute the affidavit under 78-6-2. For constitutional, due-process purposes, a corporation has been shown, supra, to be entitled to the privileges of natural persons, and be subject to the same obligations. The corporation could only appear through one of its knowledgeable agents such as its credit manager. The statute turns in 78-6-3 to the language of "claimant" which is impersonal and never uses the word "person" again. In 78-6-4 "the justice or judge or clerk shall inform the *plaintiff* of the time fixed and order him to appear at said time and to have with him his books, papers and witnesses necessary to prove his claim. When Harris came, how could he be practicing law? This could apply both to the personal litigant and to the corporation. In 78-6-3 the court or clerk may draft the affidavit that the "claimant" shall sign, which shows that if the claimant is appearing by a layman the judge or clerk may prepare the affidavit. "The plaintiff and defendant shall have the right to offer evidence in their behalf by witnesses appearing at such hearing. The justice or court may give judgment and make such orders as to time of payments as may, by him, be deemed to be right and just." So says 78-6-7, which affirms the informal procedure, shorn of

technicalities. The procedural terms of "right and just" do not fit the cloth cut by trained attorneys. Indeed, the next section, quoted supra, is the "sole object to dispensing speedy justice between the parties" — clause, and short-cuts the red-tape and technical procedures that lawyers bring to the forum. The fee for filing is cut to $1.50 by 78-6-14.

Certainly this court must wrestle with the basic procedural problems that have been faced by the California Legislature and many courts. It will be no disgrace to the legal profession for this court to find that as used in the small claims act, and none other, that "person" means corporation, and that a corporation is not precluded from sending an informed person to that court to achieve speedy justice. Where as here, the plaintiff-corporation seeks the small claims forum, that is the end of its remedy unless the defendant files a counterclaim; it cannot appeal! (78-6-10) The corporation gives up something important for its right to enter the expeditious small claims forum; the defendant does not. It would be an imposition on the other side to require the corporation to bring counsel. It is a remarkable procedural advance affirmed by California and Massachusetts, that this court ought to follow.

The trial court should be reversed in finding that a corporation need have counsel, and that its credit manger practiced law in signing the affidavit and testifying. He made no argument. It is clear the court directed every stage of the proceeding, as the statute allowed it, and the clerk under its direction, to do. After

all, justice was done. Tuttle owed the money; confessed he did; he agreed with the court to pay, and then failed. Speedy justice has been done; no injustice or bad, questionable procedure was pointed to except some of the informality wiped out at pretrial.

We move now to garnishment.

II

THE COURT ERRED IN ENJOINING A SMALL CLAIMS COURT FROM ISSUING A GARNISHMENT.

The trial court concluded that "The small claims division of the Murray City Court does not have power to issue a garnishment out of its small claims division..." (R. 90) In its judgment the same court was enjoined from so doing. There is thus raised another major issue that this court must resolve.

Be it remembered that whereas the small claims courts in Tooele, Richfield, Moab, Ogden, and Murray all allow garnishments to issue after judgment, the same courts in Salt Lake City and Provo, Utah do not. (R.75) Hence there is a serious conflict in the construction of pertinent statutes and rules, and appellants argue that to preclude the Murray small claims court in this proceeding from issuing a garnishment after judgment is a denial of due process, and deprives appellants of equal protection of the law.

The Murray court regularly issues garnishments after judgment. (R. 30) The procedures were established by the judge of that court. (R. 46)

The issue comes up under the conflict between 78-6-8 and the Rules of Civil Procedure, Rule 64 D(b) (2). The said statute concludes:

> "*No attachment or garnishment shall issue* from the small claims court, but *execution* may issue in the manner prescribed by law upon the payment of the fees allowed by law for such services."

Thus, on its face, the statute says the small claims court cannot issue a garnishment, but it also says that it may issue an execution, and we argue that if an execution may issue, this will include all of the elements of a garnishment.

The real answer is not in a construction of the above section, but in the repeal of that alleged prohibition under the following text of Rule 64D (b) (2):

> "(2) AFTER JUDGMENT. After the entry of judgment, the clerk of *any* court from which execution thereon may issue shall, upon request of the judgment creditor, *issue a writ of garnishment* and no affidavit or undertaking shall be necessary as a condition therefor."

The Murray Small Caims Court has construed this rule as a repeal of the earlier statutory prohibition. (R. 30) So we come head on to the conflict in the interpretation of the statute and the rule, and this court has jurisdiction to settle the controversy. Technically this is not an appeal from a proceeding in a city or justice court, for the immediate action was a collateral attack on the small claims judgment. Under rule 72 (a) of the Utah

Rules of Civil Procedure, this court gets its jurisdiction in any event because the validity and constitutionality of the statute and rule above in conflict must be construed by this court.

Every condition of Rule 64D (b) (2) has been met in the case at bar: The garnishment was issued by the court *after* judgment. The words of the rule above state that ANY COURT may issue the garnishment. This would embrace the small claims court; but the proviso follows that "any court from which execution thereon may be issued," and for this, let us go to the organic act on small claims courts, and it expressly allows the court to issue an execution. So that in terms, the rule nullifies the former prohibition agains garnishment out of the small claims court, and it clearly permits *any* court, which would include the small claims court, provided the court in question has power to issue an execution. Hence, the Judge and appellant Clerk of the Murray Small Claims Court thus took their authority to issue the garnishments, after judgment, such as the one at bar.

It is noted that Judge Jeppson in the pretrial order held that in his opinion "the Small Claims Court can legally issue garnishments." (R. 18)

Just how did the strange words get into the organic small caims act? Eary in the history of these procedural innovations there might have been a good reason to preclude garnishments, but we find no rational thereon, and we have looked. We would like to suggest, apart

from the Utah rule on the subject, that any court that has power to issue an execution, and does so, puts into the power of the judgment creditor all of the powers incident to garnishment, and more. In other words, may it not be said that an execution embraces all of the powers by which a judgment for money may be liquidated or realized? Why does not an execution embrace a garnishment? At 4 Am. Jur. 552 at 553 it is said of an attachment, ahead of judgment: "When the property of the debtor has thus been levied upon, it is conserved for *eventual execution* after the action shall have proceeded to judgment . . ." On page 553 the same authority says of garnishment:

> "The term 'garnishment' as used today means a proceeding or process whereby the property, money, or credits of one person, generally called the 'debtor' and in the possession of, or owing by, another, generally designated the 'garnishee' are applied to the payment of the debt of the debtor by means of process issuing against the debtor and the garnishee."

Is property in the hands of a third party, belonging to the defendant-judgment-debtor unavailable on execution? We doubt that. The subject of execution is elaborately treated in Rule 69 of the Utah Rules, and all of these powers were available to appellant Hi-Land to satisfy its judgment. Attention to the "Garnishee Execution" by the court shows that the essential requisites of an execution were present. This document refers to the judgment; it states the court issuing the same (although the small claims division thereof is not ex-

pressly stated . . . an example of the informality of that court) and that the judgment is for money, and the amount thereof, to wit, $50.18. It directs a levy on the unexempted personal property of the defendant, and in effect this was done. True it did not require a sale to convert the personal property into cash, and the cash was taken on the garnishee execution to satisfy the debt.

We do not believe this court need construe all of the tedious provisions of the execution rules unless it wants to. The court ought to predicate its disposition of this part of the case at bar by simply stating that Rule 64 D (b) (2) repealed the former prohibition, and that thereunder, a small claims court is one of the courts allowed, after judgment, to issue garnishments. To do otherwise is to cut down the efficiency and expedition of the small claims courts; make them technical, slow-moving, and ineffective; making it easy for judgment debtors to escape the payment of their debts, and requiring technical nicety to take the place of informal, speedy justice, from which there is ever a right of appeal to defendants unjustly dealt with.

Certainly this court should not go back to the cumbersome procedures of the past and find that garnishment may not issue until after an execution is filed, as in MILFORD BANK v. MURDOCK 65 P2d 627. The new rule 64 D (b) (2) has done away with this. There should be no question but that after judgment, the judgment-creditor may apply at once for the garnishment with no requirement of an affidavit or undertaking. There should be no deviation from the essential pro-

cedures followed in the case at bar, except for informalities that might be commented upon, in order to establish a more orderly procedure. To require the judgment creditor to take the route of execution would be slow, cumbersome, and unprogressive. Garnishment after judgment meets the test of due process to the debtor; he is not injured at all thereby. The tools of quick garnishment in small claims are necessary and essential to collection of small amounts. To encumber the procedure with technicalities, set aside by the new rule, would rob the small claims court of the quick remedy intended by the organic statute, amended by this new rule.

There is no good and valid reason why Salt Lake City and Provo small claims courts ought to cling to old procedures. Courts, particularly of the kind under scrutiny must find procedures that will increase the respect of the public therefor, not bog them down with technicalities that make informal function impossible. The result in the Murray court hurt no one. The man who bought the milk ought to pay for it; the injured seller, acting through its credit manager, ought to have a clear and quick way of getting at any or all of the proper assets of the debtor after judgment, without obstruction. We believe the courts, debtors, and the public will lose nothing of real value by adhering to the practice of the Murray court. Indeed, if all small claims courts are given direction in this decision, collections of small claims will be facilitated, and that is

the business of the bench and bar in this declaratory proceeding.

While we do not predicate our argument on the cumbersome procedures of execution, we ask the court to note Rule 69 (i) which authorizes a garnishee to pay the judgment creditor. And let it also be born in mind, if the question comes up, that there is no issue on appellant taking exempt property. Respondent has never raised that issue; and it is too late now.

Attention is called to Rule 81 (a):

> "These rules shall apply to all special statutory proceedings except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules."

We submit that the small claims statute, and 78-6-8 in particular, refers to the former Code of Civil Procedure in respect to executions, and thereby, the above rule makes the procedural, statutory prohibition against garnishment inoperative. It has clearly been amended by Rule 64 D (b) (2).

Rule 81 (c) makes the rules apply to city and justice courts, and thereby they expressly apply to the small claims courts. The rule under crucial examination is clearly applicable, and expressly addresses itself to "all courts," which includes small claims courts that have powers of execution.

The injunction issued by the District Court against the Murray Small Claims Court in the issuance of garnishments after judgment, must be declared to be error, and reversed.

III

THE COURT ERRED IN GRANTING JUDGMENT TO RESPONDENT FOR $50.18 AND COSTS.

If this court finds that small claims courts may be entered by corporations, and that their bona fide representatives do not practice law in making the affidavit and testifying, and seeking to collect small amounts; and in addition, that garnishments may issue under the rules of this court as an amendment to the small claims act, then it follows that the judgment given in the Murray Small Claims court to appellant Hi-Land ought to stand as collected.

We deem no special argument need be made hereon.

CONCLUSION

We respectfully request this court to reverse the trial court and find a procedure that will allow corporations to do small collections without resort to technicalities, counsel, and with the right to immediate garnishment after judgment.

Respectfully,

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